not exceeding six months, whichever is the less, in respect of any contracts of service existing between them."

In the circumstances, the contention that the service was for life could not be sustained as no such benefit was conferred on the plaintiff by the Ordinance. On the other hand, the defendants were allowed by the Ordinance to terminate the contract of service of the plaintiff. To so terminate the services of the plaintiff, the defendants were required to serve a month's notice under section 12 and to this requirement the defendants had complied. Had the defendants failed to serve a one month's notice to terminate the services of the plaintiff then the defendants would be liable for damages determined under section 13 for breach of contract. At the material time, section 13 of the Ordinance provided —

"(1) Either party to a contract of service may terminate such contract without notice, or, if notice has already been given in accordance with section 12, of this Ordinance, without waiting for the expiry of the period of notice —

(a) on paying to the other party an indemnity equal to the amount of wages which would otherwise have been earned by the labourer during such period of notice as might have been given under section 12 or during the period of time from the date of such termination of the contract to the expiry of the period of notice, as the case may be; or

(b) in the event of any wilful breach by the other party or any condition in the contract or any provision of this Ordinance applicable to such contract of service.

(2) Unless the contract of service otherwise provides, the party who breaks a contract of service shall be liable to pay to the other party a sum equal to the amount he would have been liable to pay under the provisions of paragraph (a) of sub-section (1) of this section if he had terminated such contract without notice."

Thus, even if the defendants had committed a breach of contract, which the court found otherwise, the damages which might be awarded would be one month's wages.

The plaintiff alleged that the defendants could not terminate the services of the plaintiff without valid reason or if founded on *mala fide*. In this respect the court would content itself by quoting what Gill J. (as he then was) said in the case of *D'Cruz* v. *Seafield Amalgamated Rubber Co. Ltd.*[5] —

"...I now come to the last question to be decided in these proceedings, namely, the question as to the length of notice for terminating a contract of service. I would preface that the basis of the employer and employee relationship in almost all cases is contractual, so that the general principles of the law of contract apply to a contract of service. It is therefore clear that the right of the private employer to dismiss his servant is only limited by the terms of the contract. Thus, where a contract provides for the services of an employee to be terminated on a month's notice, the employer can dismiss the servant by giving him a month's notice without stating any reason for doing so, without having any reason for doing so or indeed for the most disreputable and wicked reasons...."

The plaintiff, further contended that he was wrongfully dismissed. Now, provisions regarding dismissal in the Employment Ordinance, 1955, were, at the material time, provided for under section 14, the provisions of which were —

"(1) An employer may terminate the contract of service of a labourer without notice on grounds of such labourer's misconduct."

The court was of the opinion that had the defendants failed to serve a one month's notice on the plaintiff when the latter's contract of service was terminated, then it was a dismissal and that the defendants had no right to dismiss the plaintiff unless they could establish misconduct on the part of the plaintiff. However, since one month's notice was served, section 14(1) did not apply and the termination of service was not a dismissal.

Taking all the evidence in its totality, the court found that the plaintiff had failed to establish that he was entitled to the declaration sought for and the suit was dismissed with costs.

Suit dismissed.

Solicitors: *Elyas Majeed & Co.; Jackson & Masacorale.*

RATHEE v. SHANMUGAM

[O.C.J. (Wan Suleiman F.J.) January 15, 1981]
[Ipoh — Petition for Divorce No. 42 of 1979]

Family Law — Petition for divorce — Nullity — Wilful refusal to consummate marriage — Refusal to proceed with marriage according to religious rites — Marriage at Registry of Marriage — Mutual agreement by parties that cohabitation was to commence only after the celebration of marriage according to the rites of the Hindu religion — Refusal by respondent to arrange ceremony — Refusal constituting wilful refusal to consummate.

Hindu Customary Law — Couple married at Registry — Refusal of respondent to proceed with marriage according to religious rites — Wilful non-consummation — Marriage null and void.

The parties who were Hindus married at the Registry of Marriage, Ipoh on November 6, 1976. It was agreed by the parties that cohabitation was to commence only after the celebration of the marriage according to the rites of the Hindu religion and that was to come about two months after the civil marriage. After unsuccessful attempts by the parents of the respondent and petitioner's father to persuade the former to proceed with the marriage according to religious rites, respondent's parents and petitioner's father arranged for that ceremony to be held on June 6, 1979, apparently without previously ascertaining whether respondent would fall in with their arrangements. On or about June 3, 1979 the respondent returned to Ipoh and the following day insisted that his parents called off the religious ceremony. A few days later he personally told the petitioner that he had no intention of proceeding with the religious ceremony. He also told her that he would have nothing more to do with her.

Held: the failure by respondent in this case to proceed with the ceremony according to Hindu rites would entitle petitioner to refuse to consummate, and entitle her instead to a declaration that the marriage was null and void for wilful refusal to consummate by respondent.

Cases referred to:-

(1) *Kaur* v. *Singh* [1972] 1 All E.R. 292.
(2) *Jodla* v. *Jodla* [1960] 1 All E.R. 625.
(3) *Tan Siew Choon* v. *Tan Kai Ho* [1973] 2 M.L.J. 9.

PETITION FOR DIVORCE.

U. Harcharan Singh for the petitioner.

Respondent not appearing.

Cur. Adv. Vult.

Wan Suleiman F.J.: This is a petition by Rathee d/o Muthu under section 14 of the Divorce Act, 1952 for a declaration that her marriage to the respondent Shanmugam s/o Munusamy be declared null and void. The petition was uncontested.

The parties, according to the petitioner had undergone a ceremony of marriage at the Civil Registry of Marriages, Ipoh on November 6, 1976. It had been previously agreed by the parties that cohabitation was

to commence only after the celebration of the marriage according to the rites of the Hindu religion, and that was to come about two months after the civil marriage.

After unsuccessful attempts by the parents of the respondent and petitioner's father to persuade the former to proceed with the marriage according to religious rites, respondent's parents and petitioner's father arranged for that ceremony to be held on June 6, 1979, apparently without previously ascertaining whether respondent would fall in with their arrangements.

The parties had, understandably lived separately ever since the civil ceremony, the petitioner continuing to live in Ipoh whilst respondent resided in Kota Kinabalu, Sabah. On or about June 3, 1979, he returned to Ipoh, and the following day insisted that his parents call off the religious ceremony, and a few days later personally told petitioner that he had no intention of proceeding with the religious ceremony. What was more, he told her that he would have nothing more to do with her.

It is therefore clear that the non-consummation was the result of respondent having reneged on the earlier agreement between the parties. It is equally clear from the testimony of the petitioner that she would agree to consummate only after the Hindu Religious ceremony.

Can it rightly be said that the respondent had wilfully refused to consummate so as to entitle the wife to relief under the Divorce Act?

Petitioner called as an expert witness on Hindu Law a Hindu priest Hemraj Shashtri s/o Ramachandra who has officiated as such in the Lakshmi Narayan Temple in Kuala Lumpur, a person possessed of impressive academic qualifications whose evidence on the Hindu law particularly those pertaining to marriage I would unhesitatingly accept. According to this witness the civil ceremony (at the Civil Marriage Registry), in the eyes of Hinduism, does not constitute a valid marriage. Unless this couple, who profess to be Hindus go through the religious rites, they may not live together as husband and wife under the religious law.

Mr. Harcharan Singh for the petitioner submitted that the Civil Marriage Ordinance, 1952 in no way prevents or prohibits the parties from going through a religious ceremony before or after the civil ceremony. The crucial question is whether persistent refusal by one party to proceed with the religious ceremony, as previously agreed, amounts to wilful refusal to consummate.

The facts in *Kaur* v. *Singh*[1] are similar to the present one. The parties in that case were Sikhs who were married at a register office. The marriage had been arranged between the wife's brothers and her father on the one hand and the respondent husband on the other. In order fully to marry according to the Sikh religion and practice it was necessary to have not only a civil ceremony in a register office but also a Sikh ceremony in a Sikh temple. This was understood by the parties concerned. After the ceremony the wife returned to the house of her brother and the marriage was not consummated. It was the husband's duty to arrange the Sikh ceremony. The wife's brother approached the husband on a number of occasions and asked him what he proposed to do about the religious ceremony. The husband gave various excuses until eventually he told the wife's brother that he had no intention of arranging for the religious ceremony at all. The husband had never tried to persuade the wife to have sexual intercourse with him. The wife sought a decree of nullity on the ground of wilful refusal by the husband to consummate the marriage.

The Court of Appeal held that the wife was entitled to a decree of nullity because from the time of the ceremony at the register office the husband had entirely refused and failed to implement the marriage and in failing to do so, he had wilfully failed to consummate.

This decision was cited with approval in *Jodla* v. *Jodla (otherwise Czarnomska)*[2] where the parties were Poles. The husband had petitioned for a declaration that the marriage between himself and the wife was null and void owing to her wilful refusal to consummate the marriage. The wife denied wilful refusal to consummate the marriage, alleged that she had been willing to consummate it and prayed nullity on the ground that it had not been consummated on her husband's wilful refusal. The woman was in danger of having to be sent back to Poland because her visa was about to expire. In order that she should be able to remain legally in Britain the parties, who were both Catholics, went through a register office ceremony. The parties intended thereafter to be properly married according to the proper rites of the church. The husband according to his evidence was asked several times by the wife to make arrangements for the Catholic ceremony, but failed to do so. Thereafter the parties drifted apart, the wife refusing to live with the husband until he had arranged the religious ceremony. The trial judge held that the conduct of the wife did not amount to wilful refusal by the wife because she had a legitimate and proper excuse in the circumstances, and that it was the husband's conduct in failing to arrange the religious ceremony that resulted in the non-consummation of the marriage.

My attention was drawn to the Singapore case of *Tan Siew Choon* v. *Tan Kai Ho*[3] where Choor Singh J. went even further and extended the rule in *Jodla* v. *Jodla* to include a case where the ceremony which the spouses had agreed to undergo after the registry marriage was another ceremony in accordance with Chinese custom and not a religious ceremony. I do not feel on the facts before me that there is need for me to decide whether the principle enunciated in the two English cases earlier cited could properly be so applied.

It will suffice for me to decide that failure by the respondent in this case to proceed with the ceremony according to Hindu rites would entitle petitioner to refuse to consummate, and entitle her instead to a declaration that the marriage is null and void for wilful refusal to consummate by respondent.

In view of the special circumstances, I also ordered that decree nisi be made absolute shortened to one week from the date of the order i.e. one week from June 27, 1980.

Order accordingly.

Solicitors: *Lewis & Co.*